Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Appropriate Framework for Broadband	)	CC Docket No. 02-33
Access to the Internet over Wireline Facilities	)	
	)	
Universal Service Obligations of Broadband	)	
Providers	)	
	)	
Computer III Further Remand Proceedings:	)	CC Dockets Nos.
Bell Operating Company Provision of	)	95-20, 98-10
Enhanced Services; 1998 Biennial Regulatory	)	
Review – Review of Computer III and ONA	)	
Safeguards and Requirements	)	

COMMENTS OF VERMONT PUBLIC SERVICE BOARD

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EXECUTIVE SUMMARY

America's citizens deserve the right to send and receive information of their own design and choosing on broadband wireline facilities. Customers are guaranteed this right when they are served by a telecommunications common carrier, and the right should not be eliminated when the customer chooses to be served by broadband. By removing local exchange carriers' broadband service from Title II, the Commission places this right at risk. The risk is magnified where a single entity can use its unified control of each citizen's primary mode of access to information in order to dominate the selection of the content that the citizen ultimately sees. Where that control is exercised to favor the political preferences of a controlling entity, there is a significant risk to the most fundamental element of democracy itself: free and open information in the marketplace of ideas.

The telecommunications transport component of a local company's internet access is a "telecommunications service," subject to Title II, and it should be regulated as common carriage. This requires a "two-service" approach in which local exchange carrier transport of an internet-bound call remains "telecommunications service" under the statute. This is consistent with statutory definitions, the intent of Congress, and prior FCC decisions. Accordingly, the transport of internet-bound traffic is not "information service."

Moreover, the FCC's approach in the NPRM would compromise important consumer protections and would produce inconsistent treatment of similar facilities, based on whether they are used by an ILEC or a CLEC. By contrast, a two-service approach ensures consistent regulatory treatment of transmission across all regulatory contexts.

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I. INTRODUCTION

The Vermont Public Service Board ("Vermont PSB"), the utility regulatory body of the State of Vermont, is pleased to submit comments on the Federal Communications Commission's (the "Commission") Notice of Proposed Rulemaking released on February 15, 2002 ("NPRM").

In the NPRM, the Commission tentatively concludes that local exchange carriers' provision of wireline broadband Internet access service is an "information service." Specifically, the Commission tentatively concludes that, when a wireline carrier provides broadband Internet access service over its own transmission facilities, this service, too, is an "information service." The Commission maintains that wireline carriers' transmission of the communications is "telecommunications" provided to itself, not "telecommunications service."

The logic of the NPRM is as follows:

1. An entity provides telecommunications only when it both provides a transparent transmission path and it does not change the form or content of the information.[1]

2. Providers of wireline broadband Internet access service offer more than a transparent transmission path, and thus they offer information service.[2]

3. The definition of information service is "distinct from"[3] and is "mutually exclusive of"[4] the definition of telecommunications service.

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[1] NPRM, ¶ 19.

[2] NPRM, ¶ 20.

[3] NPRM, ¶ 18.

4. Wireline broadband Internet access service is a single "integrated offering" to the end-user.[5] In particular, it is not a combination of a telecommunications service and information service.

5. When a wireline carrier offers broadband Internet access over its own transmission facilities, the service is still an information service.[6]

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[4] NPRM, ¶ 21.

[5] NPRM, ¶ 21.

[6] NPRM, ¶ 24.

> 6. When a carrier transports data to and from the end-user on its own facilities as part of Internet access service, it is not offering "telecommunications service" because it is not offering telecommunications to the public, only to itself.[7]
>
> 7. In sum, neither the offering of wireline broadband Internet access service, nor the transport of that service, is a telecommunications service subject to Title II of the Act.

This logic has major flaws. The analysis is inconsistent with the plain meaning of these terms' definitions in the Telecommunications Act of 1996 (the "Act") and with its conclusions reached in prior decisions, and it would cause consumers to lose a number of key protections.

Most importantly, by removing Title II common carriage protections from customers' local exchange broadband Internet access transmissions, the FCC would enable a customer's local carrier to control, filter, and block the information that a customer may transmit and receive on its DSL line. The customer could lose the right to send and receive information of his or her own choosing, a fundamental right guaranteed in the very definition of "telecommunications" in the Act and by the FCC's own interpretation of common carrier duties.

[7] NPRM, ¶ 24.

This right will only become more critical as broadband technology improves and becomes more widespread. Customers will increasingly rely on their broadband connections as the most convenient source of information, news, and data, indeed to become the primary mode of access to information. But, if a single entity has unified control of that connection, it can use that control to dominate the selection of the content that each citizen ultimately sees. Where that control is linked to the political preferences of a controlling entity, there is a significant risk to the most fundamental element of democracy itself, the openness of information access.

Common carriage protection is also important because "broadband wireline Internet access" covered by the NPRM seems to include not only data traffic but quite possibly *all* of a customer's communications, including voice traffic which is carried over DSL service.[8] The NPRM does not address how the Commission would treat voice messages associated with DSL service. Nothing in the NPRM suggests that the Commission anticipates a different regulatory scheme in which only Internet access over DSL is subject to the NPRM, and voice service is subject to some other type of regulation. Consequently, other consumer protections that are key particularly to voice traffic are sacrificed as well through this analysis.

Therefore, the Vermont PSB respectfully submits that the transport element[9] of a local company's broadband access must remain a "telecommunications service" subject to the Title II protections of the Act.

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[8] The NPRM is not explicit on this important question. The NPRM states that it applies to "domestic wireline broadband Internet access services," but did not fully define "broadband." At the same time, the NPRM did clarify that broadband "presently" consists primarily of digital subscriber line ("DSL") services, a digital service that can carry voice.

[9] The Vermont PSB here takes no position on whether all Internet transport (end to end) should remain classified as telecommunications service. As long as the portion of the call from the end user to the first Internet router is classified as a telecommunications service, no provider will be able to favor particular forms or content, and our concerns here

II. THE COMMISSION SHOULD ENSURE THAT CITIZENS RETAIN THE RIGHT TO SEND AND RECEIVE INFORMATION OF THEIR OWN DESIGN AND CHOOSING THROUGH BROADBAND WIRELINE FACILITIES

would be addressed.

The Commission has asked how classifying wireline broadband Internet access as an information service would affect existing consumer protection requirements.[10] The Commission gives several examples of these protections, such as a customer's right to change its presubscribed carrier and to obtain truth in billing. The NPRM overlooks the most important consumer protection of all -- a citizen's right to send and receive communications free of editorial restraint from the provider of the service.

A. Customers Of a Telecommunications Common Carrier Are Guaranteed The Right To Transmit Information Of Their Own Choosing

As common carriers, local exchange companies must provide "service on demand"[11] to customers or offer service to all customers indiscriminately. Under prior FCC decisions and the defined term "telecommunications," common carriers must transport all information that their customers wish to send or receive as part of their common carrier duties.

[10] NPRM, ¶ 57.

[11] 47 U.S.C. § 201(a).

This duty is so fundamental that it was included in the Act's definition of "telecommunications." Under 47 U.S.C. § 153(48), Congress defined telecommunications as: "the transmission between or among points specified by the user of *information of the user's choosing*, without change in the form or content of the information as sent or received." Thus, the Congress recognized the importance of this fundamental right, and enshrined it in the very definition of telecommunications.[12]

Commission decisions for many years have recognized this part of "common carriage." More than thirty-five years ago, the Commission explicitly stated that a common carrier must transmit whatever "intelligence" its customer chooses.

[12] The rights of customers of common carriers are broader than the legal rights of customers of media, such as newspapers. A valid distinction exists between newspaper or broadcast media and a monopoly control over a user's broadband access to the Internet. Fundamentally, there is a distinction between a "carrier" and a "medium." A medium, such as a newspaper, has the power to select its content without regard to the desires of its customers, and the customer's only recourse is economic.

> [T]he fundamental concept of a communications common carrier is that such a carrier makes a public offering to provide, for hire, facilities by wire or radio whereby all members of the public who choose to employ such facilities may communicate or *transmit intelligence of their own design and choosing* between points on the system of that carrier and between such points and points on the systems of other carriers connecting with it; and that a carrier provides the means or ways of communication *for the transmission of such intelligence as the customer may choose to have transmitted so that the choice of the specific intelligence to be transmitted is the sole responsibility or prerogative of the customer and not the carrier*. The aforementioned fundamental concept of a communications common carrier applies even though the public offering is limited to a special classification of service which restricts the customer's choice to intelligence permissible within such class of service offering.[13]

The Supreme Court has cited this language with approval.[14]

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[13] *Amendment of Parts 2, 91 and 99 of the Commission's Rules Insofar As They Relate To The Industrial Relocation Services*, 5 FCC 2d 197 (1966), at ¶ 19 (citations omitted)(emphasis added).

[14] *See FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979).

[15] Similarly, a common carrier may even refuse service to a customer who uses the carrier's facilities for certain purposes, such as for "dial-a-porn."[16] But with these limited exceptions noted, customers of a common carriage service have a fundamental right to choose the information they send and receive.

B. Removing Local Exchange Carriers' Broadband Service From Title II Protections Poses Serious Risks To Customers' Rights To Control Their Own Information Transmission

[15] Certainly, a customer's right to communicate on the facilities of a common carrier is not unlimited. Customers may be penalized, for example, for making obscene, threatening or anonymous phone calls. Government can shut off discourse to protect others from hearing where substantial privacy interests are being invaded in an essentially intolerable manner, such as where communication occurs in the home. *See Cohen v. California*, 403 U.S. 15, 21 (1971). *See generally*, Huber, Kellogg, Thorne, *Federal Telecommunications Law*, 2d ed. (Huber), 1999 Aspen Law and Business, §14.7.2.

[16] *See Carlin Communications, Inc. v. Southern Bell Tel.*, 802 F.2d 1352 (11th Cir. 1986).

Broadband is serving more users at the same time that it is becoming more important to existing users. Many citizens already obtain the majority of their information using broadband services such as DSL and cable modems. As broadband capability expands to more areas, citizens will increasingly rely on broadband for their news and information needs. Most citizens who cannot buy their favorite newspaper in one place generally can find it in another. But some rural customers probably will have only one economical choice: their local telephone company that provides broadband service such as DSL.[17]

[17] Satellite services are currently significantly more expensive than most DSL services. Significant portions of rural Vermont are served by telecommunications carriers, but many rural Vermont customers have no reasonable prospect of being wired for cable service because build-out requirements include threshold densities, expressed as number of homes per mile of road, and those thresholds are not met in the most rural areas.

But broadband is undergoing changes that threaten customers' continued open access to information, and therefore also may threaten democratic rights. Increasingly, owners of broadband facilities may have a financial interest in other commercial entities and sources of information, sometimes even in news sources. Under these circumstances, broadband owners have a commercial motive to steer customers to preferred sources and away from other competitors.[18]

Providers also have the ability to control information sent and received by customers. One minimally intrusive means is to prominently display advertising from preferred sources and refuse advertising from disfavored sources. More insidiously, a provider can use search engines that steer customers away from disfavored sources. Most problematically, a provider can make access to disfavored sources difficult, complex or time consuming.

The incentives and opportunities of a broadband wireline carrier are not meaningfully different from those of cable modem service providers. Because the latter have not been subject to common carriage requirements, however, they have been at the leading edge in restricting Internet access. According to Professor Lessig, cable companies have already taken steps to use their control of the operating system's architecture to favor some applications over others.

[18] Political motives may also be influential. Providers may support or oppose particular legislation in Congress or in the states. They could impede access to opposing points of view, or even block that access entirely. Carriers could provide benefits to certain legislators and deny those benefits to other legislators.

> [F]irms such as Cisco . . . are deploying technologies to enable the 'walled garden' Internet. The [facilities owner's] network is built to prefer content and applications within the garden; access to content and applications outside the garden are 'disfavored.' 'Policy-based routing' replaces the neutral 'best efforts' rule. The content favored by the policy becomes the content that flows most easily.[19]

[19] Lessig, Lawrence, *The Future of Ideas, The Fate of the Commons in a Connected World*, Random House, New York, 2001, at 156.

Moreover, Professor Lessig reports that these strategies are no longer just ideas in development at computer labs; they have moved into the business plans of broadband providers. Companies that own cable can, and do, steer unknowing customers toward merchants that partner with the facilities' owner. They can do this "through code and marketing – through placement of ads, as well as through 'how do I' wizards that direct customers to selected sites."[20]

A governmental guarantee of information access becomes even more important when the owners of broadband facilities have a commercial or political motive to promote particular sources of news or particular points of view. As long as the market for news is effectively competitive for each citizen, there is no problem. However, if a significant portion of Internet content can be controlled by a few companies that also control broadband facilities, customers can be deprived of important sources of information.[21] This risk is enhanced when, as has increasingly been true in the past few years, content providers and communications providers are merging and otherwise joining common economic enterprises. Where that control is linked to the political preferences by the controlling entity, there is a significant risk to the most fundamental element of democracy itself, free and open information in the marketplace of ideas.

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[20] *Id.* at 158.

[21] This risk also increased with the lifting of the ban on cross-ownership of cable and telephone facilities. In 1992, the FCC recommended repeal of the cable-telephone company cross-ownership ban and modified its rules to enable some

Right now, a local company's common carriage obligations prevent it from limiting customers' communications to further commercial or political interests of a broadband affiliate. The FCC should continue to guarantee this most fundamental consumer protection through Title II non-discrimination protections.

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local telephone company participation in cable services. *See In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58*, CC Docket No. 87-266, *Second Report And Order, Recommendation To Congress, And Second Further Notice Of Proposed Rulemaking*, 7 F.C.C.R. 5781 (rel. August 14, 1992). Then Congress lifted the cable-telephone company cross-ownership ban in the 1996 Act. *See* 47 U.S.C. § 533(b); *see also City of Dallas v. FCC*, 165 F.3d 341 (1999).

III. THE TELECOMMUNICATIONS TRANSPORT COMPONENT OF A LOCAL COMPANY'S INTERNET ACCESS IS A "TELECOMMUNICATIONS SERVICE," SUBJECT TO TITLE II AND SHOULD BE REGULATED AS COMMON CARRIAGE

To reach the Internet, a residential customer must establish two physical communications connections. First, he or she must establish a connection from home to the facilities of an Internet service provider. Customers purchasing traditional low-speed Internet service rely on their telephones to establish this connection, using modems in their computers to dial in to another bank of modems hosted by their ISP. This bank of modems is known as an ISP's "point of presence" or "POP." Second, residential customers must purchase service from an ISP, such as America Online or Verizon Online, to establish a connection between the POP and the Internet. Although some ISPs offer customers additional services, all ISPs offer a connection from their POPs to the Internet.

Some consumers desire higher speed connections and subscribe to some form of "broadband" service. These customers still require two physical connections: a connection between their homes and an ISP's POP; and a connection between that POP and the Internet. Thus, customers purchasing a high-speed Internet service provided over telephone lines known as "Digital Subscriber Line" service, or "DSL," must purchase a broadband pipeline from their telephone company, and they must purchase a connection to the Internet from an ISP.

The difference is quantitative, in the speed of the connection. For both the dial-up and the broadband connection, the ISP, and the POP are a potential bottleneck. Because it is the ISP that is the entry point to the Internet, the ISP can exert some control over the customer's access to the Internet.

The Commission has asked for comment on whether a local company's provision of broadband Internet access should be classified as two separate services.[22] This is a far better approach than treating the two services as one bundled service. Specifically, the Commission should treat a local company's transmission of the call as a "telecommunications service"[23] and its ISP services as an "information service." These classifications are consistent with the Telecommunications Act of 1996, prior FCC decisions, and the Ninth Circuit's analysis of the terms in the Act.[24]

In the present NPRM, the FCC has gone far afield from both the Act and the intent of the Congress. Whether motivated by a desire to reduce incumbent carriers' Section 251(c) obligations or some other stimulus, the Commission appears willing to abandon long-settled fundamental principles of telecommunications regulation. In so doing, the Commission distorts the definitions in the Act, violates the intent of Congress, and turns its own regulatory framework on its head. Instead, the FCC should treat information services and the telecommunications service incorporated therein separately, adopting a two-services approach.

A. Local Exchange Carrier Transport Of An Internet-Bound Call Is "Telecommunications Service" Under the Statute

[22] NPRM, ¶ 27.

[23] Title II "telecommunications service" regulation could apply from the end user's location to the first Internet router, or from end to end of the call; *see* footnote 9, above.

[24] *See City of Portland*, 216 F.3d 871.

The local company's transmission of retail DSL customer's data to the Internet fits the definition of a "telecommunications service" under the Act. The elements of "telecommunications service," incorporating the elements of "telecommunications"[25] and "telecommunications service"[26] in the Act, are as follows:

1. Transmission, between or among points specified by the user.
2. Information of the user's choosing.
3. No change in the form or content of the information as sent and received.
4. Service offered to the public for a fee.
5. Without regard to the facilities used.

The Commission must properly apply statutory definitions to a service, based on the plain meaning of the term. It may not choose the definition that yields a preferred regulatory approach. On the contrary, it is obligated to accept the regulatory regime that Congress intended through its different classifications.[27]

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[25] 47 U.S.C. § 153 (43).

[26] 47 U.S.C. § 153 (46).

[27] *See In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities,* FCC 02-77, *Declaratory Ruling and Notice of Proposed Rulemaking*, (rel. March 15, 2002) (separate statement of Chairman Michael K. Powell).

The proper classification of a service is best illustrated by example. Assume that a customer uses its local carrier's DSL service to reach the Internet and it also uses the local carrier's ISP as its Internet provider. Here, the local company carries a communication designed by the subscriber from the subscriber's premises to the nearest Internet router. Thereafter, the Internet transports the call to the customer's ultimate Internet destination. This is transmission between points that the user specifies. It is also information selected by the subscriber.[28] Nor does the local carrier change the form or content of the information sent and received, since it simply transmits the communication to the Internet via its broadband DSL line, or a comparable local link.[29] The local carrier receives payment from the subscriber, and thus it offers the service to the public for a fee. The service would remain a "telecommunications service" regardless of the facilities used, since the transport would be treated identically, whether it occurred on broadband or narrowband facilities.

The Commission should not attempt to alter this analysis by the legerdemain of combining a telecommunications service with an information service. A telecommunications service does not become something else simply because the carrier providing the service elects to combine it with something else.

For these reasons, broadband wireline Internet access meets all the elements necessary for it to be classified as telecommunications service.

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[28] As we argue below, the Commission can only guarantee the second element of the "telecommunications" definition, that the information transmitted be of the customer's own choosing, if it treats the telecommunications transport element of a local carrier's broadband access as "telecommunications service."

[29] With broadband wireline Internet access, the transmission to the Internet router does not involve a form translation any more than does an analog to ISDN conversion, which is classified as telecommunications service. In analog to ISDN, a voice signal from an analog customer requires a substantial amount of information conversion before it can be delivered to the ISDN customer, and vice versa. This change to "form" is not material to the definition of telecommunications service. If voice goes in and voice goes out, then it is telecommunications service, even if the

B. Prior FCC Decisions Support Separate Treatment of Telecommunications and Information Services

telecommunications carrier has converted an analog signal to a digital signal.

In its present NPRM, the FCC departs dramatically from its long-standing approach to classifying telecommunications and information services. The FCC tentatively concludes that wireless broadband Internet access services – whether provided over a third party's facilities or self-provisioned facilities – are information services.[30] The FCC now unreasonably rejects its prior reasoning that the telecommunications services incorporated in information service offerings should be subject to Title II regulation.

[30] NPRM, ¶ 16.

In *Computer II* and *Computer III*, the FCC examined the information/enhanced services provided by Bell Companies and required the companies to offer the transmission component of the information service separately, pursuant to a tariff as a telecommunications service.[31] The FCC sought to limit the competitive advantage that such companies may have over smaller information services providers by virtue of their ownership of and control over local exchanges facilities.[32] The FCC also extended similar "unbundling" requirements on non-dominant carriers that owned transmission facilities through which they provided enhanced or information services.[33] The FCC's clear objective in these decisions was to promote competition in enhanced or information services. Regulating telecommunications and information services in a comparable manner going forward continues to promote competition in the ISP market.

[31] NPRM, ¶ 42.
[32] NPRM, ¶ 40.
[33] NPRM, ¶ 42 citing, *CPE/Enhanced Services Bundling Order*, 16 FCC Rcd at 7442, ¶ 40.

In its Universal Service Report and Order and its 1998 Universal Service Report to Congress ("Universal Service Report"), the FCC classified Internet access services provided by ISPs as information services.[34] The FCC noted, with particularity, that there is a distinct telecommunications service integral to this offering. The FCC concluded that, "when a subscriber obtains a connection to an information service provider via voice grade access to the public switched network, the connection is a telecommunications service and is distinguishable from the information service provider's service offering."[35] An essential aspect of the FCC's analysis was the view that Internet access providers typically do not own telecommunications facilities; rather, they acquire telecommunications services from telecommunications providers.[36] The FCC recognized that the provider of underlying transmission facilities is "providing telecommunications" to the Internet service provider and that information services "necessarily require a transmission component in order for users to access information."[37] The FCC acknowledged that, where there is a dial-up connection, a LEC is providing "telecommunications" regardless of what information service that customer employs.[38] Further, the FCC concluded that the underlying telecommunications services

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[34] Universal Service Report, ¶ 73.
[35] *In the Matter of Federal-State Joint Board on Universal Service,* FCC 97-157, *Report and Order* (rel. May 8, 1997), ¶ 789.
[36] *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report to Congress,* 13 FCC Rcd 1501-11529 (rel. Apr, 10, 1998), at ¶ 81.
[37] *Id.* at ¶ 57.
[38] *Id.*

are distinguishable from the Internet access services offered by Internet service providers.[39] In summary, the FCC implicitly found that the telecommunications transmission of an information service can be and should be treated as separate from the information service itself. The FCC's tentative conclusions in the NPRM constitute an about-face of this reasoning, but the NPRM fails to adequately explain why a different conclusion is now appropriate.

[39] NPRM, fn. 187.

The FCC's tentative conclusions in the NPRM also conflict with its 1999 ISP-Bound Traffic Order.[40] In the ISP Order, the chief holding was that ISP-bound traffic is an interstate service. Integral to this conclusion was the FCC's reiteration of its prior decision that the transmission component of Internet access is a telecommunications service.[41]

In suggesting now that broadband wireline Internet access is solely an information service, the FCC inappropriately focuses on the speed of the facilities used as a critical variable in deciding whether the service is an information service or a telecommunications service. In this way, the FCC imbeds a technology distinction in its reasoning and departs from its long-standing efforts to adopt technology-neutral regulations. Under the NPRM, broadband facilities that are used to connect to the Internet would be classified as an "information service" and would essentially be unregulated. On the other hand, the same functionality provided by narrowband facilities would be classified as a "telecommunications service" and affirmatively regulated as such. This distinction based on the facilities used is not only bad policy, but it plainly violates the definition of telecommunications service set forth in Section 153(46) and the FCC's ISP Order. The FCC fails to articulate how or why its present deviation from the statute and prior orders is fair and reasonable.

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[40] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* FCC 99-38, *Declaratory Ruling and Notice of Proposed Rulemaking*, (rel. February 26, 1999).
[41] *Id.* at ¶ 13.

The proposed reclassification is also directly contrary to the Ninth Circuit's interpretation of the Act. In the *City of Portland*, the Ninth Circuit Court of Appeals recognized the different classifications of the two separate services underlying Internet access.[42] The Court noted that the actual connection to a conventional dial-up ISP was a classic telecommunications service under Section 153(43).[43] In contrast, the Court recognized that the FCC considers the ISP as providing "information services" under Section 153(20).[44]

The *City of Portland* Court noted that generally ISPs are themselves users of telecommunications.[45] But, the Court viewed the relationship of an ISP that controls all of the transmission facilities between its subscribers and the Internet differently. The Court concluded that, in the circumstance where there is unity in the transmission facilities and provision of information services, the ISP provides a telecommunications service as defined in the Act.[46] In making this determination, the Ninth Circuit relied on both the statute and the FCC's prior decisions. Therefore, in addition to being contrary to its own prior rulings, the FCC's current tentative conclusions are in direct conflict with the Ninth Circuit's reasoning. The NPRM does not explain adequately why deviation from established precedent is warranted.

IV. THE TRANSPORT OF INTERNET-BOUND TRAFFIC IS NOT AN "INFORMATION SERVICE"

[42] The Court considered the classification of Internet access as part of its consideration of a more specific issue related to the regulation of a cable service franchise by a local government.
[43] 216 F.3d 871, 877.
[44] *Id.*
[45] *Id.*
[46] *Id.* at 878.

The NPRM's interpretation of "information service" is contrary to the plain meaning of the term in the Act and Congress' intent. The transport of data to a first Internet router simply does not meet the definition of "information service."[47]

[47] The statute defines information service as:

> the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

47 U.S.C. § 153(20).

First, the NPRM states that "broadband wireline Internet access" presently consists primarily of DSL service[48] which includes Voice-over-Internet[49] and Voice-on-DSL.[50] Voice communications, however, do not include any component of storage or transformation within the meaning of the Act. Therefore, Voice-over-Internet and Voice-on-DSL are not "information services." To the extent they are provided under DSL or similar tariffs, there is no question that they are "telecommunications services."

[48] NPRM, fn.2.
[49] "Voice over Internet" is voice data originated at the subscriber's premises from equipment not assigned a NANP telephone number and originated in the form of Internet Protocol packets, transmitted on the local loop, and then routed through the Internet, either to another Internet computer user or to a telephone with a NANP telephone number.
[50] "Voice in DSL" is voice data originated at the subscriber's premises in digital form from equipment assigned a NANP telephone number, transmitted on the local loop, separated by a DSLAM at the subscriber's central office or remote terminal, and then routed through the legacy switched network to a telephone with a NANP telephone number.

Second, the last clause in the definition of "information service" also demonstrates that DSL service does not fit this classification. This clause relates to capability for the management, control, or operation of a telecommunications system. The purpose of this clause is to ensure that a telecommunications service does not become an information service simply because it includes some internal processing incidental to operating the switched network. Thus, for example, the storage of telephone numbers in a computer or the use of out-of-band signaling cannot convert a telecommunications service into an information service. This remains true even if the telecommunications provider frequently or exclusively uses that computer storage or signaling system. "Telecommunications service," then, does not become an "information service" simply because the *provider* of that service decides to use computer storage or control to provision that service.

By extension, then, a telecommunications service should not become an information service simply because the *customer* uses that telecommunications service in a way that involves computer storage or control. The language on carrier data processing shows that Congress never anticipated that a customer could turn a telecommunications service (even a broadband service) into an information service simply by connecting it to the Internet.

In short, when a customer uses a telecommunications service to contact an Internet provider, even if the customer does so frequently and contacts no other user, the customer is still receiving a telecommunications service, not an information service. Nothing in the Act suggests that Congress anticipated that the result would be different if the telecommunications service is conducted at high speed or in digital format.

Third, the NPRM's view of "information service" is so broad that it swallows a good portion of "telecommunications service." This broad definition violates the intent of Congress as other applications of the term "information service" in the Act make clear. Indeed, Congress repeatedly uses the term "information service" in a much narrower context, that of a consumer purchase of information that is delivered to the customer through a telecommunications service.

There are numerous references to "information services" in Title II. For example, "information services" are listed several times in 47 U.S.C. § 228, regarding pay-per-call services. The usage is particularly key because it involves the purchase of information services using telecommunications services. The text demonstrates in several places that Congress considered information services distinct from common carrier telephone services.[51]

"Information services" are also mentioned several times in Title VI. In each case, the term appears in a narrow context. For example, in 47 U.S.C. § 544(b)(1) describes "video programming or other information services," suggesting that information service is similar to or consists of providing content, content that is then transmitted over the cable service. Certainly nothing in Title VI suggests that "information services" might encompass the cable service that delivers them to the customer.

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[51] Paragraph (c)(8)(B)(i) speaks of subscribers paying "information services" by means of a "phone bill." This provision can be understood only if one assumes that "information service" is distinct from the subscriber's "phone" service. Under the NPRM, the information service and the phone service merge.

Paragraph (c)(8)(B)(ii) requires a disclaimer that prohibits common carriers from disconnecting "local or long distance telephone service for failure to pay disputed charges for information services." Once again, the assumption is that telephone services and information services are distinct, even if the latter are sometimes billed with the former.

Subdivision (8)(E) concerns termination of service by a common carrier of the telecommunication services offered to an information service provider. Once again, the statute assumes two distinct players. It is the common carrier that terminates service to the information service provider.

In short, in all cases where the term "information service" is used in the Act, the usage is consistent with a *narrow* definition, one in which the information service is delivered to the customer by means of a separate telecommunications or cable service. For this reason, the classification contained in the NPRM is contrary to the intent of Congress.

V. THE NPRM'S TENTATIVE CONCLUSIONS WOULD COMPROMISE IMPORTANT CONSUMER PROTECTIONS

The two-services approach advocated in these comments will maintain important protections for consumers. Most of the Commission's regulatory authority over telecommunications arises from explicit and detailed statutory provisions under Title II. A plan to replace those bundles of rights and duties under Title I is unlikely to succeed. Under the two-services approach, however, the Commission retains Title II jurisdiction over the transmission component of the service, and there is no need to make dubious claims of equivalent authority grounded on Title I.

The Commission's approach would sacrifice a number of important customer protections. As discussed in detail above, the most important customer right is the right to interactively communicate intelligence of the customer's own design and choosing. At least five other statutory consumer protections under Title II of the Act are also at risk, however.

First, 47 U.S.C. § 222 of the Act protects the privacy of customer information. In particular, Subsection(c)(1) limits use of information obtained "by virtue of its provision of a telecommunications service." If local company provision of broadband is an information service under Title I of the Act, the Commission may not have authority to fashion privacy protections commensurate with those authorized by Congress in Section 222.

47 U.S.C. § 223 of the Act protects customers against obscene or harassing telephone calls. Several forms of harassment defined in Subsection (a)(1) relate to a "telecommunications device."[52] If broadband is not a telecommunications service, it is doubtful that Section 223 has any application to obscene or harassing telephone calls delivered by broadband, including Voice-in-DSL.

[52] This term is partially defined in Subsection (h)(1)(B) as excluding an "interactive computer device." What is

apparently intended, however, is simply a device that sends and receives telecommunications services.

Third, 47 U.S.C. § 225 ensures that carriers provide telecommunications relay services for hearing-impaired and speech-impaired individuals. Subsection (b)(2) gives the Commission authority over intrastate common carriers equal to its authority over interstate common carriers. The Subsection does not give the Commission any authority over information service providers, nor does it require information service providers to provide relay services. Therefore, if DSL is no longer a common carrier telecommunications service, the Commission may have insufficient authority to mandate that relay services be provided over DSL.

Fourth, 47 U.S.C. § 227 protects customers against unwanted solicitations. Subsection (a)(3) defines "telephone solicitation," in part, as "the initiation of a telephone call or message." If a message is delivered over DSL, and if DSL is not a "telecommunications service," it is doubtful that section 227 would apply. Therefore the Commission would not be able to prohibit an improper telephone solicitation arriving at the customer's premises via a DSL connection.

Fifth, 47 U.S.C. § 228 gives the Commission authority to regulate "pay-per-call" services. Subsection (c) allows the Commission to establish requirements for common carriers. If DSL is not a telecommunications service regulated under Title II, then DSL providers will not have to comply with the Section 228 requirements. In particular, they will not have to comply, as common carriers must under the terms of subsection (c)(1), with portions of the Telephone Disclosure and Dispute Resolution Act and related Federal Trade Commission regulations.

To retain these important consumer protections, the Commission should continue to classify local company transport of traffic to the Internet as telecommunications service.

VI. A TWO-SERVICE APPROACH ENSURES CONSISTENT REGULATORY TREATMENT

The two-service approach provides a consistent regulatory treatment for like services and facilities. Regulation would be based upon the function provided, not the bandwidth at which it is provided. Regulation of wholesale and retail services would be the same. There would be no violation of the principle of competitive neutrality. Moreover, a dual service approach would ensure that a telecommunications service remains exactly that, "regardless of the facilities used."[53]

The Commission's approach creates untenable unequal treatment of services over the same facilities. For example, even if the NPRM's tentative conclusions are adopted, carriers will still be able to purchase a digital loop from an ILEC on a wholesale unbundled basis. The competitor can provide DSL over that circuit by adding its own equipment. That competitor would then be purchasing the loop as a "telecommunications service." For the ILEC, though, its DSL service would be an "information service," as would the loop that provides the information service. Under the dual service approach, that same loop facility would consistently remain under Title II, and use of that loop would consistently be a "telecommunications service."

VII. CONCLUSION

For all the reasons above, the Commission should reject the tentative conclusions in the NPRM. Instead, it should adopt a two-service approach to local company broadband Internet access service and continue to regulate the telecommunications service on a common carrier basis so as to preclude providers from favoring or disfavoring selected forms or content in communications.

Respectfully submitted,

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[53] 47 U.S.C. § 153(46).

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